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7       UNITED STATES DISTRICT COURT  
8       WESTERN DISTRICT OF WASHINGTON  
9       AT SEATTLE

10      IN RE:

11      APPLICATION OF FORBES MEDIA LLC  
12      AND THOMAS BREWSTER TO UNSEAL  
13      COURT RECORDS

14      Misc. Case No. 2:21-mc-0007 RSM

15      Related to Case. Nos. GJ-17-432  
16      and GJ-19-097

17      MEMORANDUM OF POINTS  
18      AND AUTHORITIES IN  
19      SUPPORT OF PETITION TO  
20      UNSEAL COURT RECORDS

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
APPLICATION TO UNSEAL COURT RECORDS (Misc. Case No.       )  
4842-9570-4024v.1 0050033-006147

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## INTRODUCTION

2 Petitioners Forbes Media LLC (“Forbes”) and its Associate Editor Thomas Brewster  
3 (“Brewster”) seek access to sealed court records relating to two orders under the All Writs Act,  
4 28 U.S.C. § 1651, that required Sabre, a travel technology firm, to assist the United States  
5 Government in effectuating an arrest warrant (hereinafter, the “AWA Orders”). Petitioners are  
6 informed and believe that the AWA Orders were issued by the district court in 2017 and 2019,  
7 respectively, and are docketed at GJ-17-432 and GJ-19-097. *See* Ex. 1 at 4. Petitioners  
8 respectfully request that the Court unseal the AWA Orders; the government’s application for the  
9 AWA Orders and any supporting documents, including affidavits; and any other court records  
10 relating to the AWA Order, including, but not limited to, any motions to seal, the dockets in case  
11 numbers GJ-17-432 and GJ-19-097, and all docket entries (collectively, the “AWA Materials”).

12 The government’s use of the All Writs Act to obtain judicial orders requiring private  
13 technology firms in general—and Sabre in particular—to provide technical assistance to the  
14 government is a matter of intense public interest, as well as a subject of Petitioners’ ongoing  
15 reporting. *See, e.g.*, Thomas Brewster, *The FBI Is Secretly Using a \$2 Billion Travel Company*  
16 *as a Global Surveillance Tool*, Forbes (July 16, 2020), <https://perma.cc/R96R-AXL9>. Unsealing  
17 the AWA Materials will shed light on the scope of the government’s authority to compel such  
18 assistance, provide valuable insight into Sabre’s role in monitoring travelers on behalf of law  
19 enforcement, and inform the press and public about the extent of their privacy when travelling.

## FACTUAL BACKGROUND

## I. The Government's Use of the All Writs Act to Obtain Technical Assistance From Private Technology Companies Is a Matter of Intense Public Interest.

22        Originally adopted in connection with the Judiciary Act of 1789, *see* Judiciary Act of  
23        1789, ch. 20, §§ 13–14, 1 Stat. 73, 80–82, the All Writs Act in its current form authorizes federal  
24        courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and  
25        agreeable to the usages principles of law,” 28 U.S.C. § 1651. Though the All Writs Act may be  
26        used to issue orders for a range of procedural purposes, All Writs Act orders requiring private

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1 technology firms to provide the United States government with “technical assistance” are of  
 2 particular public interest. *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 171 (1977). In perhaps  
 3 the highest-profile example, the government in 2016 sought an order under the Act that would  
 4 have required Apple to provide a means of bypassing security measures on an iPhone that  
 5 belonged to one of the shooters in the San Bernardino terrorist attack. *See In the Matter of the*  
 6 *Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus*  
 7 *IS300, California License Plate 35KGD203*, No. ED 15-0451M, 2016 WL 618401, at \*1 (C.D.  
 8 Cal. Feb. 16, 2016). Before it was mooted, that litigation sparked a wide-ranging public debate  
 9 on the wisdom and legality of such technical assistance orders. *See, e.g.*, *Amicus Briefs in*  
 10 *Support of Apple*, Apple (Mar. 2, 2016), <https://perma.cc/PL6K-S6WZ> (collecting court filings  
 11 and public statements opposing the requested order).

12 The underlying legal and public policy questions raised by the San Bernardino litigation  
 13 remain unresolved. *See, e.g.*, Jack Nicas & Katie Benner, *F.B.I. Asks Apple to Help Unlock Two*  
 14 *iPhones*, N.Y. Times (Jan. 7, 2020), <https://perma.cc/HBM2-TRVZ> (describing a new FBI push  
 15 to require access to encrypted devices). As a result, the national conversation about the  
 16 appropriate scope of such compelled assistance continues unabated. *Compare, e.g.*, Alan Z.  
 17 Rozenshtein, *Surveillance Intermediaries*, 70 Stan L. Rev. 99, 176–177 (2018) (arguing that  
 18 private firms’ resistance to technical-assistance orders undermines self-government), *with Note*,  
 19 *Cooperation or Resistance?: The Role of Tech Companies in Government Surveillance*, 131  
 20 Harv. L. Rev. 1722, 1724 (2018) (arguing that the picture is “more complicated” and that firms  
 21 play an important role in checking the government).

22 **II. The Government Has Used the All Writs Act to Obtain Orders Requiring Sabre to**  
**Provide Real-Time Intelligence About Travelers’ Activities.**

23 As Petitioners have reported, circumventing encryption is not the only context in which  
 24 the All Writs Act has been invoked to compel private companies to assist federal government  
 25 surveillance efforts. *See* Brewster, *supra*. According to court records unsealed in the Southern  
 26 District of California in February 2020, the government has used the Act to require Sabre, a  
 27

1 leading travel technology company, to engage in “real-time” monitoring of travelers who are the  
 2 subject of an active arrest warrant for the government. *See* Ex. 1 at 4. Sabre is one of the three  
 3 largest players in its market, responsible for more than one-third of global air travel bookings.  
 4 *See* Brewster, *supra*. As a result, it has a staggering volume and diversity of records, including  
 5 “itineraries, fares, reservations, connecting flights and ticket costs,” as well as “crew schedules  
 6 and other logistical information.” *Id.*

7 Pursuant to the All Writs Act, the government has sought orders requiring Sabre “to  
 8 provide representatives of the FBI complete and contemporaneous ‘real time’ account activity  
 9 information” on targeted travelers, what the government has described as a “hot watch.” Ex. 1 at  
 10 2, 4. As Petitioners have reported, Marc Zwillinger—one of Apple’s attorneys in the San  
 11 Bernardino matter—described that request as “unusual and excessive” inasmuch as routine  
 12 reliance on such orders would make Sabre a de facto “agent” of law enforcement. Brewster,  
 13 *supra*. He expressed doubts, too, whether the application adequately established that the order  
 14 was necessary and not unreasonably burdensome. *See id*; *New York Tel. Co.*, 434 U.S. at 171–75  
 15 (discussing limits on technical-assistance orders under the All Writs Act, including the extent of  
 16 the burden to be imposed).

17 **III. The Sealed AWA Materials in this District Concern Similar AWA Orders to Sabre.**

18 In support of its application in the Southern District of California, the government  
 19 identified several other instances in which it had asked for—and obtained—orders under the All  
 20 Writs Act that imposed similar surveillance obligations on Sabre. *See* Ex.1 at 4. Two of them,  
 21 identified in the application as AWA order GJ19-097 and GJ17-432, were issued by this Court in  
 22 2019 and 2017 respectively. *Id.* The government’s application adverted that those matters were  
 23 still under seal at the time. *Id.* Petitioners are informed and believe that the maters are still  
 24 under seal.<sup>1</sup>

25 <sup>1</sup> Petitioners also understand that this District has historically used the ‘GJ’ designation for surveillance orders other  
 26 than warrants, regardless whether those orders are associated with a grand jury proceeding. *See* Petition to Unseal  
 27 Electronic Surveillance Dockets, Applications, and Orders at 10, No. 2:17-mc-00145 (W.D. Wash. Nov. 15, 2017).  
 While the District has since created a new designation for some of those non-warrant orders, All Writs Act orders  
 are not identified among them. *See* *Signed Memorandum Regarding New Docketing Procedures in W.D.*  
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## ARGUMENT

## **I. The Public Has a Strong Interest in Access to the Sealed AWA Materials.**

Openness is “an indispensable attribute” of our judicial system. *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 569 (1980). It guards against unfairness and inequity in the application of the law, as “the sure knowledge that *anyone*” may monitor the operation of the courts “gives assurance that established procedures are being followed and that deviations will become known.” *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (“*Press-Enterprise I*”) (italics original). Just as importantly, “public disclosure of judicial records often enhances the public’s trust in the process.” *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1088 (9th Cir. 2014). “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers*, 448 U.S. at 572. As a result, “[s]ecret proceedings are the exception rather than the rule in our courts.” *Index Newspapers*, 766 F.3d at 1084.

The news media plays a vital role in facilitating public oversight of the judicial system. As the Supreme Court has recognized, “[a] responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field.” *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966). Members of the media function as “surrogates for the public” by, for instance, attending proceedings, reviewing court filings, and reporting on the business of the judiciary. *Richmond Newspapers*, 448 U.S. at 573. And it is well-settled, to that end, that the public and press have a right of access to court documents that arises from the public’s interest in observing the consideration and disposition of matters by federal courts. *See Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) (“*Planet I*”).

The public's right of access is especially powerful in matters, like this one, that concern actions taken by the executive. As the Seventh Circuit has explained, "in such circumstances, the public's right to know what the executive is about coalesces with the right of the citizenry to

*Washington, EFF (last visited Jan. 24, 2021), <https://perma.cc/A7D2-P3PN>.* As a result, as Petitioners understand it, it is not possible to know from the designation alone whether the AWA Materials are associated with grand jury proceedings or not.

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1 appraise the judicial branch.” *Smith v. U.S. District Court*, 956 F.2d 647, 650 (7th Cir. 1992)  
 2 (quoting *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987)). The principle  
 3 that “courts must impede scrutiny of the exercise of [judicial] judgment only in the rarest of  
 4 circumstances” has special force, then, where “a judicial decision accedes to the requests of a  
 5 coordinate branch, lest ignorance of the basis for the decision cause the public to doubt” the  
 6 judiciary’s independence. *United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008).

7 Unsealing the AWA Materials at issue will ensure that actions of both the executive and  
 8 judicial branches re open to public scrutiny, and will help inform the active public debate over  
 9 the government’s use of the All Writs Act to compel private technology companies to provide  
 10 technical assistance.

11 The sealed AWA materials sought by Petitioners here are of particular public interest in  
 12 light of the weighty constitutional and policy interests implicated by location tracking. As the  
 13 Supreme Court recently reaffirmed, “location records ‘hold for many Americans the privacies of  
 14 life.’” *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (quoting *Riley v. California*, 573  
 15 U.S. 373, 403 (2014)). Their disclosure to the government can burden a broad range of First and  
 16 Fourth Amendment values, including reporter-source confidentiality. *See generally* Br. Amici  
 17 Curiae of the Reporters Committee for Freedom of the Press and 19 Media Organizations in  
 18 Support of Petitioner, *Carpenter*, 138 S. Ct. 2206. And the Court has, in that vein, shown  
 19 “special solicitude for location information” even when those location records are held by a third  
 20 party, such as Sabre. *Carpenter*, 138 S. Ct. at 2219. For this reason too, the press and public  
 21 have a keen interest in understanding the government’s basis for seeking AWA Orders directing  
 22 Sabre to provide it with contemporaneous—or “real-time”—travel information about a targeted  
 23 individual or individuals, and the district court’s basis for issuing those AWA orders.

24 **II. The Public Has Common-Law and Constitutional Rights to Access the AWA  
 25 Materials.**

26 “The law recognizes two qualified rights of access to judicial proceedings and records, a  
 27 common law right ‘to inspect and copy public records and documents, including judicial records

1 and documents,’ and a ‘First Amendment right of access to criminal proceedings’ and documents  
 2 therein.” *United States v. Business of Custer Battlefield Museum & Store Located at Interstate*  
 3 *90, Exit 514, S. of Billings, Mont.*, 658 F.3d 1188, 1192 (9th Cir. 2011) (first quoting *Nixon v.*  
 4 *Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978), then quoting *Press-Enter. Co. v. Superior*  
 5 *Court*, 478 U.S. 1, 8 (1986) (“*Press-Enterprise II*”)). Under either framework, the press and  
 6 public have a presumptive right of access to the materials at issue here.

7           **A.       The Public Has a Common-Law Right of Access to the AWA Materials.**

8           The press and public have a common-law right to access the AWA Materials, which are  
 9 unquestionably “judicial records.” *Custer Battlefield Museum*, 658 F.3d at 1193 (quoting *Nixon*,  
 10 435 U.S. at 597). “[A] ‘strong presumption in favor of access’” to such documents “is the  
 11 starting point” of the common-law analysis. *Kamakana v. City of Honolulu*, 447 F.3d 1172,  
 12 1178 (9th Cir. 2006) (quoting *Foltz v. State Farm Mutual Auto. Insurance Co.*, 331 F.3d 1122,  
 13 1135 (9th Cir. 2003)). Only a “narrow range” of judicial records is not subject to the right of  
 14 public access at all, and then only if such records have “‘traditionally been kept secret for  
 15 important policy reasons.’” *Kamakana*, 447 F.3d at 1178 (quoting *Times Mirror Co. v. United*  
 16 *States*, 873 F.2d 1210, 1219 (9th Cir. 1989)). And the Ninth Circuit has stressed that the mere  
 17 fact that documents “may roughly fall into the category of law enforcement materials” is not  
 18 enough to justify concluding that the common-law right of access does not attach, even if given  
 19 “documents are usually or often deemed confidential” after weighing the relevant interests. *Id.* at  
 20 1185; *see also infra* Part III (discussing the compelling showing the government must make to  
 21 overcome the presumptive right of access with respect to any specific court record).

22           All of the AWA Materials at issue here are judicial records to which the common-law  
 23 presumption of public access applies. Indeed, the AWA Materials are in, as one court put it, the  
 24 “top drawer of judicial records[,]” which consists of “documents authored or generated by the  
 25 court in discharging its public duties, including opinions, orders, judgment, [and] docket  
 26 sheets”—a drawer that is “hardly ever closed to the public.” *In re Sealing and Non-Disclosure*  
 27 *of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 891 (S.D. Tex. 2008). So too here. Certainly  
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1 “[t]here is no doubt that the court orders themselves are judicial records,” since “[c]ourt  
 2 decisions are the ‘quintessential business of the public’s institutions.’” *In re Leopold to Unseal*  
 3 *Certain Electronic Surveillance Applications and Orders*, 964 F.3d 1121, 1128 (D.C. Cir. 2020)  
 4 (quoting *EEOC v. Nat’l Children’s Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996)). So, too, are  
 5 the court’s docket sheets reflecting those orders. *See, e.g., id.* at 1129.

6 The same is true of the government’s applications requesting such orders, and any  
 7 supporting documents. An application for a judicial order to a third party under the All Writs  
 8 Act is analytically no different from any other motion, petition, or application seeking court-  
 9 ordered relief. The Act is routinely invoked in open court, in that vein, to request a range of  
 10 common-law writs and several varieties of equitable relief that determine the obligations of third  
 11 parties. *See* Samuel I. Ferenc, Note, *Clear Rights and Worthy Claimants: Judicial Intervention*  
 12 *in Administrative Action Under the All Writs Act*, 118 Colum. L. Rev. 127, 139–141 (2018)  
 13 (collecting contexts). Such materials, “filed with the objective of obtaining judicial action or  
 14 relief,” are quintessentially judicial records. *United States v. Appelbaum*, 707 F.3d 283, 295 (4th  
 15 Cir. 2013); *see also Kamakana*, 447 F.3d at 1179 (emphasizing the strength of the public’s  
 16 interest in motions that, like a motion for summary judgment, ask the court to “adjudicate[]  
 17 substantive rights” (quoting *Foltz*, 331 F.3d at 1135)).

18 **B. The Public Has a Constitutional Right of Access to the AWA Materials.**

19 In addition to a presumptive common-law right to inspect the AWA Materials, the public  
 20 also has a constitutional right of access to those judicial records. In determining whether the  
 21 First Amendment affords a right of access to a document at any particular stage in a judicial  
 22 process, courts look to the complimentary considerations of “experience and logic” — that is,  
 23 “whether the place and process have historically been open to the press and general public” and  
 24 “whether public access plays a significant positive role in the functioning of the particular  
 25 process in question.” *Press-Enterprise II*, 478 U.S. at 8, 9. As the Ninth Circuit has explained,  
 26 “[w]here access has traditionally been granted to the public without serious adverse  
 27 consequences, logic necessarily follows.” *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 n.2 (9th

1 Cir. 2008). But “even without an ‘unbroken history of public access,’ the First Amendment right  
 2 exists if ‘public scrutiny’ would ‘benefit’ the proceedings.” *Id.* (quoting *Seattle Times Co. v.*  
 3 *U.S. Dist. Court*, 845 F.2d 1513, 1516–17 (9th Cir. 1988)). Applying those principles here, the  
 4 First Amendment right attaches to the AWA Materials.

5 **1. The Public Has a Constitutional Right of Access to the AWA Order.**

6 As to the AWA Order itself, “it should go without saying that the judge’s opinions and  
 7 orders belong in the public domain.” *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th  
 8 Cir. 2000); *see also United States v. Ressam*, 221 F. Supp. 2d 1252, 1262 (W.D. Wash. 2002)  
 9 (emphasizing the “venerable tradition of public access to court orders”). As the D.C. Circuit  
 10 recently observed, “since at least the time of Edward III, judicial decisions have been held open  
 11 for public inspection.” *In re Leopold*, 964 F.3d at 1128 (citing 3 Edward Coke, *Reports*, at iii-v  
 12 (London, E. & R. Nutt & R. Gosling 1738) (1602)). Logic informs that history, since “[w]ithout  
 13 access to judicial opinions, public oversight of the courts, including the processes and the  
 14 outcomes they produce, would be impossible.” *Doe Co. v. Pub. Citizen*, 749 F.3d 246, 267 (4th  
 15 Cir. 2014).

16 Applying this principle, the Ninth Circuit has found a First Amendment right of access to  
 17 a variety of miscellaneous orders, *see Index Newspapers*, 766 F.3d at 1093 (contempt order); *In*  
 18 *re Copley Press*, 518 F.3d at 1026 (order granting motion to seal), as have other district courts  
 19 within the Ninth Circuit, *see, e.g., Ressam*, 221 F. Supp. 2d at 1262 (protective order). And,  
 20 particularly in the context of warrants and other judicial records related to criminal  
 21 investigations, access to court orders plays the critical role of assuring the public “that judges are  
 22 not merely serving as a rubber stamp for the police.” *Custer Battlefield Museum*, 658 F.3d at  
 23 1194 (quoting *In re N.Y. Times Co.*, 585 F. Supp. 2d 83, 88 (D.D.C. 2008)). So too here. While  
 24 the Ninth Circuit has yet to squarely resolve how the “experience and logic framework” applies  
 25 to All Writs Act orders, there is no reason to exempt such orders from the usual presumption of  
 26 “public access to court orders.” *Ressam*, 221 F. Supp. 2d at 1262.

**2. The Public Has a Constitutional Right of Access to the Application and Supporting Materials.**

2 The public also has a First Amendment right of access to the application and any  
3 supporting materials. The Ninth Circuit has not resolved how the “experience and logic”  
4 framework applies to applications under the All Writs Act, but as discussed *supra* Part II.A, such  
5 applications play the same role in the adjudicatory process that other presumptively accessible  
6 motions for court-ordered relief do. Many forms of relief authorized by the Act have  
7 traditionally been sought in open court; the propriety of any particular writ of mandamus, for  
8 instance, is plainly the kind of question that has long been litigated in public. *See Marbury v.*  
9 *Madison*, 5 U.S. (1 Cranch) 137, 137 (1803). Logic points in the same direction: “The public  
10 has an interest in learning . . . the evidence and records” that underpinned a court order  
11 determining the legal obligations of a third party, or else the public cannot judge for itself  
12 whether the court’s order has a valid basis. *Pub. Citizen*, 749 F.3d at 267. The government has  
13 already implicitly recognized as much in the All Writs Act context. The Justice Department  
14 favored litigating the validity of its technical assistance request to Apple in public view on the  
15 theory that the public, if fully apprised of the government’s reasons for seeking such an order,  
16 would be more likely to believe that the government was justified in applying for such novel  
17 relief. Cf. Justin Wm. Moyer, *FBI Director Makes Personal, Passionate Plea on Apple-San*  
18 *Bernardino Controversy*, Wash. Post (Feb. 22, 2016), <https://perma.cc/J29X-S8X3>.

**3. The Public Has a Constitutional Right of Access to the Docket Sheet in Case Nos. GJ-17-432 and GJ-19-097.**

Finally, the public and press have a First Amendment right of access to the docket sheets reflecting the AWA Materials filed with the Court. There is a “centuries-long history of public access to dockets.” *United States v. Mendoza*, 698 F.3d 1303, 1304 (10th Cir. 2012). And a number of federal appellate courts have recognized a First Amendment right of access to docket sheets, *see Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004); *Pub. Citizen*, 749 F.3d at 268, including in the context of investigative materials, *see In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 575 (8th Cir. 1988).

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PETITION TO UNSEAL COURT RECORDS (Misc. Case. No. \_\_\_\_\_) - 9  
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1 To hold otherwise would make nonsense of the right of access, since without a docket  
 2 that gives notice of the existence of an application or order, the public would have no  
 3 opportunity to oppose “closure of a document or proceeding that is itself a secret.” *Pub. Citizen*,  
 4 749 F.3d at 268. Petitioners’ ability to assert their rights in this very case, for instance, is  
 5 grounded in the fortuity that the existence of the AWA Order was referenced in an entirely  
 6 different public document. The same dynamic unfolded in the case of an All Writs Act  
 7 application and order unsealed in the District of Massachusetts in 2016: The ACLU was able to  
 8 assert its right of access only because the order’s existence was referenced in a public search  
 9 warrant affidavit. *See Janus Rose, Apple’s Next Encryption Battle is Likely Playing Out in*  
 10 *Secret in a Boston Court*, Vice (Mar. 31, 2016), <https://perma.cc/X7UA-D9YV>. The  
 11 government in that case promptly conceded that there was no continued need to seal the  
 12 application and order. *See Motion to Unseal, In re One Gray and Black Colored Apple iPhone*,  
 13 No. 1:16-mj-02007 (D. Mass. Apr. 8, 2016). If not for that affidavit’s stray reference to the  
 14 existence of the matter, then, a docket that could no longer constitutionally remain sealed would  
 15 nevertheless have remained so indefinitely.

16 At heart, as the D.C. Circuit explained in articulating the common-law right of access to  
 17 certain electronic surveillance orders, “[i]t would make little sense to provide public access to  
 18 court documents but not to the indices that record them and thus make them accessible.” *In re*  
 19 *Leopold*, 964 F.3d at 1129. The right of access is a dead letter absent “a meaningful ability for  
 20 the public to find and access those documents” to which the right attaches. *Index Newspapers*,  
 21 766 F.3d at 1086. Experience and logic therefore dictate that the press and public have a right of  
 22 access to the docket sheets in GJ-17-432 and GJ-19-097.

23 **III. The Public’s Rights of Access Can Be Overcome Only on a Compelling Showing**  
 24 **That the Government Cannot Make in This Case.**

25 The rights of access at issue here are weighty. Where the First Amendment right  
 26 attaches, records can be sealed only if “specific, on the record findings are made demonstrating  
 27 that ‘closure is essential to preserve higher values and is narrowly tailored to serve that interest.’”

1 *Press-Enterprise II*, 478 U.S. at 13–14 (quoting *Press-Enterprise I*, 464 U.S. at 510). Where the  
 2 common-law right applies, “a ‘strong presumption in favor of access is the starting point,’” and  
 3 “[a] party seeking to seal a judicial record then bears the burden of overcoming this strong  
 4 presumption by . . . ‘articulat[ing] compelling reasons’ . . . that outweigh the general history of  
 5 access and the public policies favoring disclosure.” *Custer Battlefield Museum*, 658 F.3d at  
 6 1194–95 (quoting *Kamakana*, 447 F.3d at 1178–79) (alteration in original). No such showing  
 7 can be made here.

8       This is not, for instance, a case in which the government can claim an interest in  
 9 preserving “the secrecy of law enforcement techniques.” *In re Motion to Compel Facebook to*  
 10 *Provide Technical Assistance*, 357 F. Supp. 3d 1041, 1044 (E.D. Cal. 2019). The fact that Sabre  
 11 engages in “hot-watch” monitoring of travelers on behalf of the government is already public.  
 12 *See Brewster, supra.* Moreover, the existence of the particular AWA Order at issue—which  
 13 dates back to 2016—also is already public. *Id.* And, to the extent the AWA Materials contain  
 14 information that the government nevertheless can demonstrate it has a compelling or  
 15 countervailing interest in maintaining under seal, the Court “can accommodate those concerns by  
 16 redacting sensitive information rather than refusing to unseal the materials entirely.” *Custer*  
 17 *Battlefield Museum*, 658 F.3d at 1195 n.5.

18       Those conclusions are fortified by the likelihood that the underlying arrest warrants,  
 19 which are now more than a year old, have already been executed. As the Ninth Circuit has  
 20 explained in elaborating the common-law right of access, “[p]ost-investigation . . . warrant  
 21 materials ‘have historically been available to the public.’” *Custer Battlefield Museum*, 658 F.3d  
 22 at 1193 (quoting *In re N.Y. Times Co.*, 585 F. Supp. 2d at 88). At that stage of a proceeding, the  
 23 government’s secrecy interests are sharply attenuated—the search or arrest has been  
 24 accomplished—and the balance shifts decisively in favor of the public’s interest in “keepi[ng] a  
 25 watchful eye on the workings of public agencies.” *Id.* at 1194 (internal quotation omitted)

1 (alteration in original).<sup>2</sup> The same considerations are instructive in weighing the government's  
 2 interest—to the extent it can, in fact, demonstrate one—in maintaining the AWA Materials at  
 3 issue here under seal. *Cf. In re One Gray and Black Colored Apple iPhone*, No. 1:16-mj-02007  
 4 (D. Mass. Apr. 8, 2016) (minute order) (granting the government's motion to unseal All Writs  
 5 Act materials where corresponding search warrant had already been executed).

## 6 CONCLUSION

7 For the foregoing reasons, Applicants respectfully request that the Court enter an order  
 8 unsealing the AWA Materials.

9  
 10 DATED this 25<sup>th</sup> day of January, 2021.

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 31 *Attorneys for Petitioners Forbes Media LLC*  
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33  
 34  
 35  
 36 <sup>2</sup> Regardless of the investigation's status, the public has a right of access to related sealing motions and orders, *see In re Copley Press*, 518 F.3d at  
 37 1026, if not attachments to those motions, *see United States v. Doe*, 870 F.3d 991, 997 (9th Cir. 2017) (citing *In re Copley Press*, 518 F.3d at  
 38 1026–28). “Logic . . . dictates that the record of these types of proceedings should be open to the public,” at least in part, “because the very issue  
 39 at hand is whether the public should be excluded or included in various types of judicial proceedings.” *Index Newspapers*, 766 F.3d at 1096.

## **CERTIFICATE OF SERVICE**

I hereby certify that on January 25, 2021 I caused to be served the foregoing document by Certified Mail on the United States Attorney for the Western District of Washington at:

United States Attorney's Office  
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DATED this 25<sup>th</sup> day of January, 2021.

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